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April 10, 2008

**Via e-mail to rule-comments@sec.gov**

Nancy M. Morris
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: File Number SR-FINRA-2007-021**

Dear Ms. Morris:

I am writing to comment on FINRA's proposed Rule 12504 on dispositive motions. I have represented customers in NASD and FINRA arbitrations for approximately fifteen years. I have not kept track of the number of dispositive motions to which I have responded, but I believe I have responded to hundreds of them.

I have strong objections to the following provision in the proposed rule:

> (a)(6) The panel cannot act upon a motion to dismiss a party or claim under paragraph (a) of this rule, unless the panel determines that: . . .
>
> (B) the moving party was not associated with the account(s), security(ies), or conduct at issue.

This provision singles out and arguably puts FINRA's and the Commission's stamp of approval on certain types of motions to dismiss that are routinely filed in arbitrations my firm handles.

In recent years, my firm has filed many "selling away" claims against brokerage firms. Selling away claims involve private securities transactions that brokers recommend and execute without the formal written approval of their brokerage firms. Before the final hearing, brokerage firms commonly challenge selling away claims in one or both of two different ways. First, they file lawsuits in court alleging that the claims are not arbitrable under NASD or FINRA rules. My firm has defended dozens of these court challenges. See, e.g., MONY Sec. Corp. v. Bornstein, 390 F.3d 1340, 1346 (11th Cir. 2004); Multi-Financial Sec. Corp. v. King, 386 F.3d 1364 (11th Cir. 2004); Washington Square Sec., Inc. v. Aune, 385 F.3d 432 (4th Cir. 2004); California Fina Group, Inc. v.

Herrin, 379 F.3d 311 (5th Cir. 2004) WMA Sec., Inc. v. Wynn, 2002 WL 504965 (6th Cir. Apr. 1, 2002); John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 59 (2d Cir. 2001); Financial Network Investment Corp. v. Becker, 305 A.D.2d 187, 762 N.Y.S.2d 25 (2003); O.N. Equity Sales Co. v. Pals, 509 F. Supp. 2d 761 (N.D. Iowa 2007); O.N. Equity Sales Co. v. Steinke, 504 F. Supp. 2d 913, 914 (C.D. Cal. 2007); Financial Network Investment Corporation v. Thielbar, 2003 WL 22019348 (N.D. Ill. Aug. 26, 2003); Daugherty v. Washington Square Sec., Inc., 271 F. Supp. 2d 681 (W.D. Pa. 2003); Jefferson Pilot Sec. Corp. v. Blankenship, 257 F. Supp. 2d 962 (N.D. Ohio 2003); Washington Square Sec., Inc. v. Sowers, 218 F. Supp. 2d 1108, 1117 (D. Minn. 2002); BMA Financial Services, Inc. v. Guin, 164 F. Supp. 2d 813, 820 (W.D. La. 2001); Investors Capital Corp. v. Rimmler, 2001 WL 114936 (M.D. Fla. 2001); WMA Sec., Inc. v. Ruppert, 80 F. Supp. 2d 786, 789 (S.D. Ohio 1999); Summit Brokerage Services, Inc. v. Cooksley, 2002 WL 31478190 (Fla. Cir. Ct. Nov. 6, 2002). Courts uniformly rejected the brokerage firms' arguments in these cases, because, as the Eleventh Circuit said in Multi-Financial Sec. Corp. v. King, 386 F.3d 1364, 1370 (11th Cir. 2004), under NASD [or FINRA] rules, "[w]hen an investor deals with [an NASD] member's agent or representative, the investor deals with the member."

Second, brokerage firms routinely file motions to dismiss in the arbitrations, alleging that their brokers acted without the firms' approval or knowledge and that the firms therefore were not associated with the securities and conduct at issue. In response to these motions, we argue that the current rules do not expressly allow motions to dismiss in arbitration, that we are entitled to a hearing, and that we have not yet completed discovery. We also point out that, under federal and state securities laws, brokerage firms are controlling persons over their brokers and that the Commission has repeatedly sanctioned brokerage firms for failing to supervise selling away activities. See, e.g., PFS Investments, Inc., Exchange Act Release 42,069, 67 S.E.C. Docket 1502, 1998 WL 422161, at *6 (July 28, 1998) ("[T]he procedures in place at the compliance departments . . . were not reasonably designed to detect selling away activities. . . . [The firm therefore] failed reasonably to supervise . . . with a view towards preventing violations of the securities laws, within the meaning of Section 15(b)(4)(E) of the Exchange Act."). In accordance with our arguments, under the current rules, the arbitrators in our cases have denied every one of these motions to dismiss on these grounds.

The new proposed rule, however, if approved, could mistakenly appear to give FINRA's and the Commission's imprimatur of approval specifically to motions to dismiss in selling away cases. Brokerage firms could argue that, unlike almost all other claims, FINRA and the Commission have expressly supported dismissals without a hearing of selling away claims, on the ground that the firm "was not associated with the account(s), security(ies), or conduct at issue." I believe that FINRA intended this proposed provision narrowly to address misidentification issues in which the claimants sued the wrong person or entity. I do not believe that FINRA intended the provision to authorize dismissals of claims when the claimants have correctly identified the firms that employed the brokers and have alleged that the firms are responsible under the controlling person, respondeat superior, agency, or neligent supervision doctrines for the private securities transactions of their brokers.

Nevertheless, I also believe that industry parties will attempt to drive a Mack truck through this narrow opening, and that some arbitrators could be swayed by their incorrect arguments. This

result would be inconsistent with the many court decisions cited above that selling away claims are arbitrable. It would also be inconsistent with the Commission's repeated pronouncements, in cases such as PFS Investments, that brokerage firms are required to engage in reasonable supervision to detect and prevent unauthorized private securities transactions.

It would further be inconsistent with the Commission's, FINRA's, and the NASD's recent statements that the FINRA arbitration forum is available for selling away claims. When the NASD proposed new Rule 12200, the Securities Industry Association asked that the Rule specify that only NASD member firms' customers could demand arbitration. The NASD "responded that adding the words 'of the member' after the word 'customer' would inappropriately narrow the scope of claims that are required to be arbitrated under the Customer Code." Order Approving Proposed Rule Change to Amend NASD Arbitration Rules for Customer Disputes, 72 Fed. Reg. 4,574, 4,579 (2007).

> NASD . . . clarif[ied] . . . that the term "business activities of a member" in Proposed Rule 12200 would include "selling away" claims [allegations that an associated person engaged in securities activities outside his or her firm]. Under the current Code, NASD accepts cases brought by customers against associated persons in selling away cases, and cases by customers against the associated person's member firm if there is any allegation that the member was or should have been involved in the events, such as an alleged failure to supervise the associated person. . . . Rule 12200 is not intended to change the scope of arbitrable disputes. NASD [will] . . . continue to accept these types of cases . . . .

Id. at 4,579-80.

In accordance with the overwhelming weight of the case law, in accordance with the Commission's many statements in cases such as PFS Investments, and in accordance with the NASD's and FINRA's most recent statements on the subject when the Commission approved new Rule 12200, I respectfully request that the Commission delete the language in proposed Rule 12504(a)(6)(B). As a lesser alternative, I request that the Commission add clarifying language to the rule that will spell out that dismissals are not appropriate when claimants have alleged that industry respondents are liable under such doctrines as controlling person liability, respondeat superior, agency, and negligent supervision.

Thank you for allowing me to provide these comments.

Sincerely,

/s/ Stephen Krosschell